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IN THE

Supreme Court of the United States

October Term, 1963

No. 468

CARMINE GALANTE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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(1) The government's statement of facts seems to have little relevancy to the questions presented. Regrettably, it is also seriously inaccurate and, indeed, frequently contradicted by the very portions of the record on which it purports to rely. Some of the misstatements of fact which more directly pertain to petitioner Galante are discussed below.

(2) The overall justification advanced by the government for the denial of petitioner's elementary rights is the argument that some of the defendants, not otherwise identified or identifiable, engaged in a concerted effort to bring the trial to a halt (Gov. Br. 25). Presumably, the activities attributed to Galante by the government are meant to show that he partook in some way in the execution of the scheme. However, the activities on which the government relies are

either innocuous, unsupported by the record or contradicted by it.

On two separate occasions during the trial the two prosecutors called to the trial court's attention that they deemed themselves slandered by remarks of petitioner Galante made outside the hearing of the judge, the court reporter, and the jury (Gov. Br. 16, 20). The purported slanders were denied in each case. It is unfathomable how these slanders, even if deemed established, could possibly have served to abort the trial.

Somewhat more relevant, perhaps, is the government's assertion that petitioner Galante threatened that he would "get" the chief prosecutor (Gov. Br. 21, 26). If proven, such a threat would at least show an intent on the part of petitioner Galante to interfere with the prosecution by intimidating the prosecutor. However, the "threat" is pure fiction. In fact, in the cited portions of the record, he said, in the absence of the jury, the very opposite of what the government's brief claims. The trial judge himself made it abundantly clear that petitioner was merely expressing the hope that he, the judge, would ultimately deal with the prosecutor. It was not unreasonable for petitioner to believe himself the victim of suborned perjury (Pet. 6-7). Even on sentence petitioner naively expressed his hope that someday the prosecutor, stricken by remorse, would plead "guilty" to subornation of perjury before the very judge who presided at trial (11967-68).

(3) The few facts which the government's brief mentions in connection with the trial court's deprivation of petitioner's right to counsel are also misstated. Just as the opinion below, the government seeks to create the impression that the second trial was delayed because some defendants wilfully failed to hire counsel. As the prosecutor himself made clear, the delay was due, in part, to the government's own choice and, in part, to the inability of the

District Court to find counsel to assign to those defendants who were indigent (10730-31, Pet. 11). In any event, these matters have no bearing on petitioner, since he was not one of the defendants who had difficulty finding counsel.

It is also not true that medical check-ups revealed "nothing wrong" with either Mr. Iannuzzi or Miss Kahn. At the cited (Gov. Br. 21) portion of the record the trial judge merely relates unspecified information that no "objective symptoms" were found. In the very same context, even the trial judge acted on the assumption that there was "something wrong" with Mr. Iannuzzi and Miss Kahn (Pet. 15).

It may be merely misleading to use the active tense in stating that Miss Kahn absented herself from the trial when she was hospitalized, since she was the victim of an accident; the statement that she refused to give up exhibits in her possession is belied by the very portions of the record which the government cites in support (Gov. Br. 21).

The statement that petitioner "Galante instructed his various counsel not to talk with each other or to turn over the [missing] exhibits" (Gov. Br. 21) is equally wide of the mark. The record reference is to a statement by the prosecutor in which he quotes a Deputy Marshal as having overheard a part of one side of a telephone conversation, which the Deputy Marshal thought might have been with Miss Kahn, in which petitioner, who had been remanded, instructed whomever he was talking to, not to turn over to anyone his "personal property." Since the conversation plainly did not refer to the missing exhibits, this vague hearsay hardly establishes that petitioner Galante harbored some *mens rea* concerning them.

If the statement in the government's brief is construed as an admission that Deputy Marshals were in fact listening in on conversations between petitioner and his counsel, a new facet of the question whether petitioner was de-

prived of the effective assistance of counsel is presented. This Court might wish to determine whether such eavesdropping vitiates a prosecution. Cf. *Coplon* v. *United States*, 191 F. 2d 749, cert. denied, 342 U. S. 926; *Washington* v. *Cora*, 382 P. 2d 1019 (Washington, June 30, 1963, not yet officially reported).

The statement (Br. 21) that the court appointed Mr. O'Connor, "whom Galante had earlier consulted", to act as his attorney, is misleading (Pet. 14-6).

(4) The government does not attempt to answer directly questions 5, 6 and 7 (prejudicial conduct of the trial) raised by petitioner Galante; nor is there any dispute that, concerning the pertinent aspects of the decision below, the Second Circuit is in conflict with the Fifth Circuit (Pet. 30-2).

Evidently, the government contends that the questions raised by petitioner Galante are sufficiently answered by arguing that the misconduct of some defendants represented a deliberate scheme to provoke a mistrial (Br. 27) and that some unidentified defendants acted in concert (Br. 25). The government contends that the conclusion that such a scheme was afoot "was virtually irresistible" (Br. 27) and that the trial court actually reached the conclusion that the outbursts which punctuated the trial were part of a concerted effort by some defendants to bring the proceedings to a halt (Br. 25). The trial court made no such finding. Some of the instances adduced by the government to illustrate the operation of the "scheme" seem too feeble to rank as attempts to abort the trial; *e.g.*, uncomplimentary, but hardly inappropriate or untruthful, remarks of a defense counsel about the government's main witness, or the request of a co-defendant to attend his aunt's funeral (Br. 16). Of course, there is no evidence whatever that there was such a scheme, and some of the events which disrupted the trial are hardly consistent with the notion that petitioner Galante took part in such a scheme.

It is well-nigh absurd to assume that he instigated Salvatore Panico to accuse him falsely of attending the Apalachin meeting (Pet. 20-21) or that the two acted "in concert." Moreover, this Court held that it was error for the trial court to decide summarily that Panico had the capacity to form the requisite criminal intent to be guilty of contempt. *Panico v. United States*, No. 45, October Term, 1962. *A fortiori*, it would be error to find summarily that he had the requisite capacity to act "in concert" with co-defendants to halt the trial, and that such a scheme had been formed outside the court-room, with or without his participation. Nor can there be any conceivable justification for the trial court's observation concerning one of Panico's outbursts that it was "obviously a put up job" (Pet. 19). This observation was made by the trial court in the hearing of the jury and in rejecting a motion for mistrial by another defendant, so that the jury must have received the impression that other defendants had some responsibility for "putting up the job."

Since this Court held that Panico may have lacked the capacity to "put up a job," other defendants were surely entitled not to be charged by the judge with "putting up a job" through Panico. It is plain that the contentions advanced by the government furnish as little justification for upholding the action of the trial court, as does the opinion below.

(5) The government makes no answer to the fourth question (compulsory process for witnesses) presented by petitioner Galante. In answer to questions 1, 2 and 3 (deprivation of right to counsel), the government relies on the opinion below. The petition points out that the only meaningful interpretation of the opinion below, in this context, is that Miss Kahn or Mr. Iannuzzi feigned illness at petitioner's instigation; further, there was no determination of that issue by the trial court; and even if there were, there could be no fair determination without a hearing (Pet. 28-30).

The latter part of this contention is virtually identical with that tendered by Panico's petition for certiorari (Galante Pet. 30). This Court has just held that the "fair administration of Federal criminal justice" required a hearing to determine whether Panico was capable of committing contempt. The trial court had even less opportunity to observe directly whether Miss Kahn and or Mr. Iannuzzi were feigning illness and whether petitioner Galante had instigated the malingering.

(6) In dealing with question 8 the government incorrectly states that it is conceded that Cadieux, as well as Smith, worked for the government for nine months before the wiretap. This is true only of Smith (Pet. 34). In any event, neither mentioned petitioner until long after the wiretap.

(7) The government incorrectly states that Galante has not adopted the questions raised by other petitioners so far as applicable. On the contrary, he has done so (Conclusion, Pet. 35).

(8) Petitioner was fifty-three years old when he was sentenced to twenty years' imprisonment after a trial that could hardly be called fair. Unless this Court intervenes, petitioner is likely to spend the remainder of his life serving a sentence so imposed. The seriousness of the consequences of the conviction emphasizes the importance of the questions presented by this petition.

Respectfully submitted

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